IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

GENERAL ELECTRIC CAPITAL CORPORATION
Plaintiff

V. NO. 4:96cv355-B-D

BALLY GAMING, INC., and
BALLY GAMING INTERNATIONAL, INC.
Defendants

MEMORANDUM OPINION

This cause comes before the court upon the defendants' motion to dismiss for improper venue. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

FACTS

This action arises out of three loan transactions to which the plaintiff, General Electric Capital Corporation ("General Electric"), is a creditor and the defendants are guarantors. The transactions involved the purchase of casino equipment and fixtures for the Jubilation Casino (formerly the Cotton Club Casino) which is presently located in Waveland, Mississippi. The Jubilation Casino has been closed since July of 1996. The debtor is in default on each of the three loans. The plaintiff, as creditor, filed this suit on December 31, 1996, seeking to recover the indebtedness from the defendant guarantors.

The defendant Bally Gaming, Inc.,[1] filed suit against the debtor on December 24, 1996, in the United States District Court for the Southern District of New York, seeking to compel the debtor to take certain steps to protect the collateral. General Electric was named as a party to the New York action, though the complaint does not designate General Electric as a defendant.

[1] Bally Gaming International, Inc., is the guarantor on two of the loans, and Bally Gaming, Inc., is the guarantor on the third. Bally Gaming, Inc., is the only one which is a party to the New York action. Throughout this opinion, both defendants will be referred to collectively as "Bally Gaming."

Bally Gaming asserts that General Electric is an indispensable party to the New York action as holder of the notes. The New York complaint asserts that the debtor has taken numerous actions that are detrimental to the interests of both General Electric and Bally Gaming. The New York complaint seeks relief against the debtor, but not against General Electric.

LAW

The defendants move to dismiss this action on the grounds that the three loan agreements contain specific forum selection clauses, none of which provide for jurisdiction in the Northern District of Mississippi. The defendants further argue that the plaintiff's claims should have been raised as a mandatory counterclaim to the New York action, or that in accordance with the first-to-file rule, this court should decline to exercise jurisdiction in favor of the New York action. In the alternative, the defendants move to transfer this cause to the Southern District of New York for the convenience of the parties and witnesses in accordance with the provisions of 28 U.S.C. § 1404(a).

Based upon the allegations of the complaint, this court has jurisdiction over both the parties and the subject matter of this action. The defendants do not raise lack of personal jurisdiction as a defense; rather, they assert that for various reasons, this case should be tried in the Southern District of New York. The chief argument of the defendants is that the parties are contractually bound to litigate their claims in forums other than the Northern District of Mississippi. However, the court finds that the forum selection clauses raised by the defendants do not prevent this court from exercising jurisdiction.

Of the three loan agreements, only two contain forum selection clauses. One of the clauses states that Bally Gaming agrees "to submit" to the jurisdiction of certain courts and the other states that Bally Gaming "consents to be sued" in certain enumerated jurisdictions. Forum selection clauses have been construed as permissive, rather than mandatory, where they show consent to the jurisdiction of a particular forum, but do not state that the forum has exclusive jurisdiction. See Keaty v. Freeport Indonesia, Inc., 503 F.2d 955, 956-957 (5th Cir. 1974); see generally Caldas & Sons, Inc. v. Willingham, 17 F.3d 123 (5th Cir. 1994). From the language of

the clauses at issue, the court finds that both of these forum selection clauses are permissive, and therefore do not limit the forum to the courts of a particular jurisdiction.

The court further finds no merit in the argument that General Electric's claims should have been raised as a compulsory counterclaim in the New York action. First of all, as plainly stated in Rule 13(a) of the Federal Rules of Civil Procedure, compulsory counterclaims are to be brought against opposing parties. It does not appear from the face of the New York complaint that General Electric and Bally Gaming are opposing parties in the New York action. The complaint, which seeks relief only against the debtor, asserts that the debtor has taken actions which are detrimental to the interests of both Bally Gaming and General Electric. Furthermore, a counterclaim would not be appropriate in the New York action since Bally Gaming does not seek any relief against, and thus has asserted no claim against, General Electric.

Finally, neither the rules on compulsory counterclaims nor the first-to-file rule applies because the factual and legal issues raised in the two actions are not substantially similar. See Underwriters on Note JHB92M10582079 v. Nautronix Ltd., 79 F.3d 480, 483 n.2 (5th Cir. 1996); Mann Mfg., Inc. v. Hortex, Inc., 439 F.2d 403, 407-408 (5th Cir. 1971). The New York action seeks to compel the debtor to take certain steps to protect the collateral, for the benefit of both the creditor, General Electric, and the debtor, Bally Gaming. This action, instituted by the creditor, General Electric, seeks to recover the indebtedness from the unconditional guarantors, Bally Gaming and Bally Gaming International. From reading the two complaints, the only similarities apparent are that both causes of action are based on the same three loan agreements. Therefore, the court finds that the defendants arguments regarding compulsory counterclaims and the first-to-file rule are unavailing.

The defendants' alternative motion for a § 1404(a) transfer is likewise without merit. The defendants have failed to make the necessary showing to carry their burden of proving that the interests of justice warrant transfer to New York. The plaintiff's choice of forum is entitled to great weight. Apache Prods. Co. v. Employers Ins. of Wausau, 154 F.R.D. 650, 653 (S.D. Miss. 1994). The party seeking transfer must specify key witnesses and make a general statement as to

their testimony, so that the court may evaluate not only the number of witnesses but the importance of their testimony as well. Sorrels Steel Co. v. Great Southwest Corp., 651 F. Supp. 623, 629 (S.D. Miss. 1986). Transfer to another jurisdiction is not appropriate where the effect will be to merely shift the inconvenience from one party to another. Id., at 630. The defendants have merely provided a list of witnesses without any discussion of the nature of their testimony. Of the sixteen potential witnesses listed by the defendants, only seven have New York addresses. In considering all of the factors relevant to a motion to change venue, the court finds that a § 1404(a) transfer to the Southern District of New York is not warranted.

CONCLUSION

For the foregoing reasons, the court finds that the defendants' motion to dismiss or, in the alternative, to transfer venue should be denied. An order will issue accordingly.

THIS, the ____ day of June, 1997.

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NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE